

STATE OF MICHIGAN
COURT OF APPEALS

KAY LACEY, ROBERT LACEY, LAURA
ARRINGTON, TRACY CARD, DON CARD, and
KAREN WHEELER,

UNPUBLISHED
November 17, 2015

Plaintiffs/Counter-Defendants-
Appellants,

v

DEBRA ELLIOTT and JOHN ELLIOTT,

Defendants/Counter-
Plaintiffs/Appellees.

No. 323125
Oakland Circuit Court
LC No. 2013-135562-CH

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the order granting defendants' motion for entry of judgment pursuant to mutual acceptance of a case evaluation award. We affirm.

I. FACTS

This action arose from an easement dispute among neighbors. Plaintiffs' complaint and defendants' counter complaint alleged various counts of trespass, nuisance in fact, and conversion, and plaintiffs also alleged a count seeking declaratory action. As relevant to this appeal, case evaluation was held, and the case evaluation panel issued an award, which the parties accepted.

Defendants moved for entry of judgment pursuant to the case evaluation award. In support of their motion defendants relied on *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), asserting that although the case included equitable claims and claims for damages, "none of the claims were exempted from case evaluation pursuant to MCR 2.403(A)(3)." Defendants argued that the case should be dismissed in its entirety, including the equitable claims. Plaintiffs opposed defendants' motion, asserting that both the complaint and counter complaint alleged claims seeking equitable relief, and that both sides had summary disposition motions pending before the lower court regarding their equitable claims. Plaintiffs further referenced the case evaluation summaries and what transpired at the case evaluation hearing in support of their opposition to defendants' motion for dismissal, contending that both sides had maintained that the equitable claims were not subject to case evaluation.

The trial court, in a thorough written opinion, granted defendants' motion for entry of judgment pursuant to the mutual acceptance of the case evaluation award. Defendants filed their notice of presentment of proposed judgment, and plaintiffs objected pursuant to MCR 2.602(B)(3), asserting that the proposed judgment did not comport with the case evaluation award that was the underlying basis for the lower court's decision. Plaintiffs submitted their own proposed judgment, which included a provision that the "[d]isposition of the equitable claims is without prejudice." Defendants moved for the notice of settlement of proposed judgment to be heard by the lower court.

Plaintiffs subsequently filed a motion to set aside the case evaluation award. In relevant part, plaintiffs argued that the scope and use of the easement was still at issue, and that the parties did not intend that the equitable claims be submitted to case evaluation. In response, defendants questioned the timing of the filing of the motion, asserted that the setting aside of the case evaluation was not warranted, and that plaintiffs' motion was essentially a restatement of the arguments it had made earlier when defendants sought entry of a judgment of dismissal following case evaluation. The trial court denied plaintiffs' motion to set aside the case evaluation award and entered its judgment dismissing all claims, pursuant to mutual acceptance of the case evaluation award. It is from this order that plaintiffs now appeal as of right.

II. ANALYSIS

Plaintiffs argue that the lower court erred in granting judgment in favor of defendants on the basis of our Supreme Court's ruling in *Cam Constr*, 465 Mich 549, because *Cam Constr* did not involve equitable claims that were expressly excepted from case evaluation. According to plaintiffs, the parties expressly agreed to exempt the equitable claims from the case evaluation panel. Plaintiffs also assert the lower court abused its discretion in denying plaintiffs' motion to set aside the case evaluation award.

The lower court's decision to enter judgment dismissing the case was predicated on its review and interpretation of MCR 2.403. This Court reviews de novo a lower court's interpretation of the court rules. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014). "The principles of statutory construction apply when interpreting a Michigan court rule." *Id.* When interpreting statutory language, this Court considers both the plain meaning of the words at issue, as well as their "placement and purpose in the statutory scheme." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134; 860 NW2d 51 (2014). The decision whether to set aside a case evaluation is reviewed for an abuse of discretion. *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 510; 448 NW2d 493 (1989). It is only appropriate to set aside an acceptance where it is necessary to prevent a substantial injustice. *Id.*

The starting point for the analysis is the plain language of MCR 2.403. MCR 2.403(A) provides in pertinent part:

(1) A court may submit to case evaluation any civil action in which the relief sought is primarily money damages or division of property.

* * *

(3) *A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.* [Emphasis added.]

Pursuant to MCR 2.403(K)(3), “[t]he evaluation may not include a separate award on any claim for equitable relief, but the panel may consider such claims in determining the amount of the award.”

MCR 2.403(C) specifies the appropriate procedure for parties to follow when seeking to remove the case from case evaluation.

(1) To object to case evaluation, a party must file a written motion to remove from case evaluation and a notice of hearing of the motion and serve a copy on the attorneys of record and the ADR clerk within 14 days after notice of the order assigning the action to case evaluation. The motion must be set for hearing within 14 days after it is filed, unless the court orders otherwise.

(2) A timely motion must be heard before the case is submitted to case evaluation.

Once a case has been submitted for case evaluation, MCR 2.403(L)(1) governs the parties’ acceptances and rejections of a panel’s evaluation:

(1) Each party shall file a written acceptance or rejection of the panel’s evaluation with the ADR clerk within 28 days after service of the panel’s evaluation. Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety as to a particular opposing party. The failure to file a written acceptance or rejection within 28 days constitutes rejection.

MCR 2.403(M) is dispositive in the instant appeal as it sets forth the “[e]ffect of acceptance of evaluation.” In relevant part, it provides:

(1) *If all the parties accept the panel’s evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits*

(2) *If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel’s evaluation, the court shall enter an order disposing of only those claims.* [Emphasis added.]

In *Cam Constr*, 465 Mich at 551, the plaintiff filed a four-count complaint against the defendant. The defendant moved for summary disposition of count IV of the complaint, and

after the court granted the defendant's motion, the plaintiff did not appeal that decision. *Id.* The parties proceeded to case evaluation, and both parties submitted summaries. *Id.* There appeared to be confusion with regard to whether count IV was addressed during the case evaluation. *Id.* After case evaluation, the panel recommended that the defendant pay the plaintiff \$5,400, which both parties accepted. *Id.* at 551-552. After the defendant moved to dismiss the case in its entirety pursuant to MCR 2.403(M)(1), the plaintiff asserted it had a right to appeal the court's summary disposition of count IV. *Id.* at 552. The Supreme Court rejected the plaintiff's argument that it could appeal an earlier summary disposition ruling even after the parties had accepted the case evaluation panel's award, holding:

The language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that all claims in the action, even those summarily disposed, are dismissed. Thus, allowing bifurcation of the claims within such actions, as plaintiff suggests, would be directly contrary to the language of the rule. [*Id.* at 555 (footnote omitted).]

The *Cam Constr* Court also rejected the plaintiff's reliance on *Reddam v Consumer Mtg Corp*, 182 Mich App 754; 452 NW2d 908 (1990), overruled by *Cam Constr*, 463 Mich 549, in which this Court reviewed an older, less explicit version of MCR 2.403(1), and expressly ruled that *Reddam* and subsequent Court of Appeals cases were overruled to the extent that they "improperly allow a party to make a showing 'that less than all the issues were submitted' to case evaluation." *Cam Constr*, 465 Mich at 556.

Allowing the parties involved in the case evaluation process to make such a showing has no basis in the court rule. Even if *Reddam* permitted such an approach under the less detailed language of former MCR 2.403(M), there plainly is no warrant for proceeding in that manner under the language of the current version of MCR 2.403(M)(1):

If all the parties accept the panel's evaluation, *judgment will be entered* in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, *in which case the court shall dismiss the action with prejudice*. The *judgment or dismissal shall be deemed to dispose of all claims in the action* and includes all fees, costs, and interest to the date it is entered. [*Id.* at 556-557, quoting MCR 2.403(M)(1) (emphasis in original).]

In a concise and succinct directive to lower courts, the *Cam Constr* Court made the following statement.

As we have explained, this unambiguous language of MCR 2.403(M)(1) evidences our desire to avoid bifurcation of civil actions submitted to case evaluation. To the extent that *Reddam* and its progeny have been read to suggest that parties may except claims from case evaluation under the current rule, these cases are overruled. *If all parties accept the panel's evaluation, the case is over*. [*Id.* at 557 (emphasis added).]

Plaintiffs attempt to distinguish the present case from *Cam Constr*, arguing that “there is no question that the equitable claims of the parties in this case were not subject to the case evaluation panel’s award.” Plaintiffs also argue that *Cam Constr* is distinguishable because it did not involve equitable claims like the instant matter. However, that argument is not persuasive where the plain language of MCR 2.403(A)(3) clearly provides that only the trial court had the authority to exempt the equitable claims from case evaluation if it found “that case evaluation of such claims would be inappropriate.” It did not do so. Further, MCR 2.403(M)(2) clearly contemplates that equitable claims may be withheld from the case evaluation process, but only pursuant to the lower court’s authority under MCR 2.403(A)(3). In other words, because neither party moved the trial court to remove the equitable claims from the case evaluation, all the claims were subject to the provisions of MCR 2.403(M).

Subsequent to *Cam Constr*, this Court has held that once both parties to a case evaluation accept the award, the case is finished, and judgment dismissing all claims is properly entered. In *Magdich & Associates, PC v Novi Dev Assocs, LLC*, 305 Mich App 272, 275; 851 NW2d 585 (2014), this Court held that even where the defendant had outstanding counterclaims at the time of case evaluation because the lower court had not yet ruled on a motion to amend the counterclaim, the parties’ mutual acceptance of the case award and the plaintiff’s payment of the award required dismissal with prejudice of all claims in the case. The *Magdich* Court echoed the reasoning from *Cam Constr* that the bifurcation of claims, or deciding lawsuits “piecemeal,” is not allowed under the plain language of MCR 2.403. *Magdich*, 305 Mich App at 280. The *Magdich* Court also recognized that the defendant in that case, like plaintiffs in the instant case, had not taken appropriate steps pursuant to MCR 2.403 to remove the case from case evaluation. *Id.*

Accordingly, in light of both the plain language of MCR 2.403(A) and (K), and *Cam Constr* and *Magdich*, we hold that the lower court correctly dismissed all claims after both parties accepted the case evaluation. Although *Cam Constr* and *Magdich* did not involve equitable claims such as those in the instant case, the *Magdich* Court recognized that “[t]he court rules governing case evaluation provide that ‘claims seeking equitable relief’ may be exempted from case evaluation upon good cause shown or the stipulation of the parties if the court finds that the evaluation of such claims would be inappropriate. MCR 2.403(A)(3). However, the plain language of the court rule does not exempt any other type of claim from case evaluation” *Magdich*, 205 Mich App at 279. Further, MCR 2.403(A)(3) provides clear directives to litigants concerning how to have a case involving equitable claims removed from case evaluation. Plaintiffs simply did not act in compliance with the court rule by filing a motion to remove the equitable claims from case evaluation, and so the entire case was subject to dismissal upon both parties acceptance.¹ The result plaintiffs seek would have occurred had they moved the trial court to exempt the equitable claims, MCR 2.403(A)(3), and had the court done so, the

¹ We likewise reject plaintiffs’ argument that the notation by the case evaluators that “easement rights not mediated” somehow took those claims out of case evaluation. The court rule, MCR 2.403(A)(3), provides the only avenue to exempt claims from case evaluation.

resulting mutual acceptance of case evaluation would not have resulted in dismissal of the equitable claims. MCR 2.403(M)(2).

The trial court also did not abuse its discretion in refusing to set aside the case evaluation. Plaintiffs cite *State Farm Mut Auto Ins Co v Galen*, 199 Mich App 274, 278; 500 NW2d 769 (1993), where this Court, quoting *Reno v Gale*, 165 Mich App 86, 92-93; 418 NW2d 434 (1987), recognized that a judgment entered after a mediation acceptance could be set aside where failure to do so would result in a “substantial injustice.” However, where the court rule is clear with regard to how equitable claims are removed from case evaluation, and plaintiffs did not take appropriate action to do so, a substantial injustice would not occur.

Plaintiffs next contend that defendants’ motion to enter judgment seeking dismissal of all claims with prejudice was inconsistent with their position at case evaluation, and the trial court erred in failing to deny defendant’s motion under the doctrine of judicial estoppel.

“Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) (footnotes, quotations and citations omitted). The *Spohn* Court continued:

Under the “prior success model” of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. In accordance with this model of judicial estoppel, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. The prior success model, however, does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits. [*Id.* at 480 (footnotes, citations and quotations omitted).]

The doctrine of judicial estoppel is not applicable nor do the challenged actions rise to a level such that defendants must be judicially estopped from asserting that dismissal of the entire case was appropriate after both parties mutually accepted case evaluation. At most, defendants took inconsistent positions at case evaluation and before the trial court on the motion for entry of judgment.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray